United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-2068

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELMORE CUNNINGHAM, ET. AL	
APPELLANTS	
-AGAINST-	
BENJAMIN WARD ET. AL	
APPELLEES	

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P/S

REPLY BRIEF

MICHAEL C. FAHEY, ESQ.,
Acting Project Director
BRONX LEGAL SERVICES, CORP.C
579 Courtlandt Avenue
Bronx, New York 10451
Tele: (212) 993-6250

STEPHEN M. LATIMER, ESQ.,
Of Counsel
Attorney for Appellant

TABLE OF CASES

UNITED STATES COURT OF APPEALS
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ELMORE CUNNINGHAM, ET. AL APPELLANTS -AGAINST- BENJAMIN WARD ET. AL APPELLEES	No. 76-2068

REPLY BRIEF

THE ACTION SHOULD
BE REMANDED TO
THE DISTRICT COURT
FOR FURTHER PROCEEDINGS

Appellees claim that they are not properly before this Court because the action was dismissed sua sponte by the District Court for the Northern District of New York prior to service of the summons and complaint. That procedure, routinely employed by Judges Port and Foley in the Northern District, has been severely critized by this court because 1) it is unfair to pro.se plaintiffs and 2) it creates "a time consuming shuttle between the court of appeals and the district court..." Burgin v Henderson 536 F2d 501, 502 n.1 (2 Cir. 1976), Frankos v La Vallee 535 F2d 1346, 1347 n.1 (2 Cir. 1976) Mawhinney v Henderson No. 76-2028 (2 Cir. August 30, 1976) sl. op. 5280 n.1, and should not be condoned here.

This Court may proceed in spite of the premature dismissal by the District Court because appellees filed a

brief in which, however curtly, the discussed the merits. Frankos v. LaVallee, supra. Should the Court find that plaintiff has raised substantial constitutional claims*, the appropriate procedure is to remand to the District Court for further proceedings Morgan v LaVallee 526 F2d 221, 226 (2 Cir. 1975) Mawhinney, supra, Burgin, supra.

Respectfully Submitted,

MICHAEL C. TAHEY, ESQ.,
Acting Project Director

Bronx Legal Services Corp. C
579 Courtlandt Avenue
Bronx, N.Y. 10451
Tele: (212) 993-6250

STEPHEN M. LATIMER, ESQ.,
of Counsel
Attorney for Appellant

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* Appellees misread appellants brief on the merits. Appellants do not concede, as appellees state in their brief at P3, that Wolff v Mc Donnell 418 U.S. 539 (1974) applies only when loss of good time or solitary confinement is at issue. They specifically rely on this Courts holding in Mawhinney, supra that whether Wolff applies to punishment other than solitary confinement or loss of good time was left open by the Supreme Court in Enemoto v Wesley 96 S. CT 1551 (1976) (Appellants br. p.5). Even so, appellants argue that keeplock is a form of solitary confinement. (Appellants br. pp.11-13).

CERTIFICATE OF SERVICE

This is to ceritify that on October 13, 1976 a copy of the within reply brief was served by mail on the Attorney General of New York State at his offices at No. 2 World Trade Center, New York, N.Y.

Stephen M. Latimer
Attorney for appellants